UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Isidro OLIVO Z-557-52-9018

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2512

Isidro OLIVO

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 21 April 1989, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's Merchant Mariner's Document outright for six months and an additional six months, remitted on twelve months probation, upon finding proved the charge of misconduct. The charge was supported by two specifications which were found proved. An additional specification was dismissed by the Administrative Law Judge.

The first specification alleges that Appellant, under the authority of the above captioned document, was, on or about 20 January 1989, wrongfully under the influence of alcohol while aboard the M/V EXXON YORKTOWN in violation of 33 C.F.R. SS95.045(b).

The second specification alleges that at the same time and date aforementioned, Appellant was in wrongful possession of certain alcoholic beverages. This specification was dismissed by the Administrative Law Judge.

The third specification alleges that at the same time and date aforementioned, Appellant wrongfully assaulted and battered the second officer of the M/V EXXON YORKTOWN, Jorge Viso, by beating him with his fists.

The hearing was held at Long Beach, California on 12 April 1989. At the hearing, Appellant was represented by professional counsel and entered a plea of denial to the charge and specifications.

The Investigating Officer introduced in evidence four exhibits and the testimony of three witnesses. In his defense, Appellant introduced in evidence seven exhibits, his own testimony, and the testimony of another witness.

After the hearing, the Administrative Law Judge concluded that the charge and the first and third specifications were proved, and entered a written order suspending Appellant's document outright for six months and for an additional six months, remitted on twelve months probation.

The Decision and Order was issued on 21 April 1989, and was served on Appellant on 28 April 1989. Appellant's request for a temporary document was denied on 11 May 1989. Appeal from the Decision and Order was timely filed on 10 May 1989, and perfected on 17 August 1989. A substitute brief was filed on 23 August 1989.

FINDINGS OF FACT

1. At all times relevant, Appellant was serving in the capacity of oiler aboard the M/V EXXON YORKTOWN under the authority of his Merchant Mariner's Document which authorized him to serve as Ordinary Seaman, Pumpman, and Steward's Department (Food Handler). The M/V EXXON YORKTOWN is an inspected United States flag tank vessel, 663 feet in length and 21,446 gross tons.

2. On 19 January 1989, the M/V EXXON YORKTOWN was moored off Barber's Point, Hawaii, discharging and loading cargo. Appellant was among those crewmembers who had been granted shore leave. The vessel had contracted P&R Water Taxi Co. to ferry crewmembers to and from Pier 10 at the Aloha Tower, Honolulu. Since the vessel was scheduled to sail early in the morning of 20 January 1989, the crew was due back aboard the vessel by midnight on the 19th. The last launch was scheduled to depart from Pier 10 at 2300.

3. Appellant had gone ashore on the launch at 1800. At approximately 2130, Appellant went to a bar where he consumed four to five beers in about an hour. Appellant was not at Pier 10 when the last launch was scheduled to depart. The launch delayed, waiting for Appellant, until 2315 before it departed. Appellant arrived at the Pier at approximately 2325.

4. The Master of the M/V EXXON YORKTOWN, when notified of Appellant's arrival, ordered the launch to return to the pier to transport Appellant to the ship since otherwise the vessel would be undermanned. When the launch returned, the launch operator observed Appellant drinking from a bottle of bourbon and also observed that Appellant stumbled, was unsteady, was flush, and had a strong odor of alcohol on his breath. The launch departed Honolulu at 0230. Based on the above observations, the launch operator suggested that a safety line should be used while Appellant climbed the pilot ladder to board the M/V EXXON YORKTOWN which had departed its berth.

5. Appellant, after ascending the pilot's ladder, was met by the Second Mate, Mr. Viso, who had been ordered to escort Appellant to his quarters by the Master. When asked by Mr. Viso if he had any alcohol in his possession Appellant replied, "of course". [TR. 53]. When the Second Mate sought to have the Appellant open his bag, Appellant responded by throwing the bag overboard.

6. Appellant was stumbling and cursing as the Second Mate led him to his quarters. At each doorway, Appellant would step inside and say, "which way?". When the Second Mate placed his hand on Appellant's shoulder to direct him into the ladder trunkway, Appellant responded, "you don't push me". When Mr. Viso again sought to guide

Mr. Olivo, he, the Appellant, struck the Second Mate. Mr. Viso retaliated by striking Appellant on the face. Appellant then came at the Second Mate again. Mr. Viso, fearing bodily harm, struck Appellant a second time causing Appellant to fall to the deck.

7. Appellant was taken to the ship's hospital. Given Mr. Olivo's condition, the Master directed him to be sent ashore to receive proper medical attention. Appellant arrived at the Queen's Medical Center in Honolulu at 0450.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. On appeal, Appellant asserts that:

(1) It is not an offense under 33 C.F.R. ÷95.045 for an intoxicated seaman to return to his vessel from shore leave when he is not scheduled for duty for at least six hours;

(2) Mr. Olivo was not given the opportunity to adequately defend himself since (a) the first specification did not name the intoxicant in question, and (b) the third specification did not specify whether Appellant had the requisite intent essential to the charge of assault;

(3) The Administrative Law Judge did not make specific findings of fact as to (a) who was the assailant, (b) whether Mr. Olivo could have had the requisite intent to commit an assault if he was, arguendo, intoxicated, and (c) whether Mr. Olivo was acting in self-defense;

(4) The Administrative Law Judge failed to make specific findings as to the credibility of Mr. Olivo and Mr. Viso as witnesses;

(5) Mr. Olivo was selectively prosecuted by the United States Coast Guard Investigating Officer;

(6) The order suspending Mr. Olivo's Merchant Mariner's Document for six months was excessive and therefore a cruel and unusual punishment contrary to the Eighth Amendment of the United States Constitution;

(7) Mr. Olivo is entitled to an award of reasonable attorney fees against the United States Coast Guard; and

(8) Mr. Olivo is entitled to compensatory and/or punitive damages against the Investigating Officer and the United States Coast Guard for personal injuries as a result of the suspension of his document.

OPINION

I

With respect to the first specification, Appellant asserts that it is not misconduct for a seaman to come aboard his ship while intoxicated when not scheduled to be on duty for another six hours. Appellant's interpretation of the regulations is erroneous. Title 33 C.F.R. ÷95.045 plainly states: "While on board a vessel inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code, a crewmember . . . (b) Shall not be intoxicated at any time;" [Emphasis added]. Since the record established that Appellant was a crewmember of the M/V EXXON YORKTOWN, [IO. Ex. 1], and that the vessel is subject to inspection, [IO. Ex. 2], it need only be shown Appellant was intoxicated to find a violation of the regulation.

The Administrative Law Judge specifically found that Appellant was intoxicated when he boarded the M/V EXXON YORKTOWN. Findings of fact will not be disturbed on appeal unless inherently incredible. Appeal Decision 2395 (LAMBERT), See also, Appeal Decision 2333 (AYALA), Appeal Decision 2302 (FRAPPIER). Based on the entire record, the Administrative Law Judge's finding that Appellant was intoxicated when he boarded the M/V EXXON YORKTOWN on or about 20 January 1989, is not inherently incredible.

Moreover, this finding was supported by the testimony of numerous witnesses describing Appellant's inebriated condition. It is established that lay observations as to manner, speech and behavior can support the inference of intoxication. Appeal Decision 2198 (HOWELL), See also Appeal Decision 1700 (McGRAW), Appeal Decision 1461 (HALVORSEN). Based on this testimony, there was substantial evidence Appellant was intoxicated as defined in 33 C.F.R. ÷95.020 and 33 C.F.R. ÷95.030, and therefore was in violation of 33 C.F.R. ÷95.045. The charge of misconduct was proved with relation to the first specification since substantial evidence of a violation of a duly established rule is per se misconduct. Appeal Decision 2341 (SCHUILING). See also, Appeal Decision 2445 (MATHIASON), aff'd Commandant v. Mathiason, NTSB Order No. EM-146; and Appeal Decision 2248 (FREEMAN).

II

Appellant claims he could not adequately prepare his defense as the specifications did not fully apprise him of the charges. However, any challenge to the adequacy of a specification must be raised at the hearing rather than for the first time on appeal. Appeal Decision 2450 (FREDERICKS), aff'd Commandant v. Fredericks, NTSB Order No. EM-147; Appeal Decision 2400 (WIDMAN); and Appeal Decision 2386 (LOUVIERE). From the record, it is clear Appellant understood the charges and the context in which they arose, and thus cannot be heard now to complain of their insufficiency.

Appellant claims the first specification was inadequate as it did not name the intoxicant in question. However, even were the failure to name the specific intoxicant a defect, dismissal would not be in order since Appellant understood the issues and had a full opportunity to litigate them at the hearing. Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950). See also NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938); and Citizens State Bank of Marshfield, Mo. v. FDIC, 752 F.2d 209 (8th Cir. 1984). Given the

remedial and administrative nature of suspension and revocation actions, "a specification need not meet the technical requirements of court pleadings, provided it states facts which, if proved, constitute the elements of an offense." Appeal Decision 2422 (GIBBONS) and Appeal Decision 2166 (REGISTER). The first specification was sufficient to enable Appellant to identify the offense and prepare a defense pursuant to 46 C.F.R. ÷5.25.

Appellant claims the third specification was inadequate as it did not specify the element of intent which he claims is essential to a charge of assault and battery. Appellant has confused this specification with those offenses where the element of intent is inherent in the statutory definition. Specific intent to assault need not be proved where the law does not clearly make it an element of the offense. Parker v. United States, 359 F.2d 1009, 1012 (D.C. Cir. 1966); see also, People v. Rocha, 3 Cal. 3d 893, 92 Cal. Rptr. 172, 479 P.2d 372 (1971). Assault charged under 46 U.S.C. ÷7703(2) does not require the Investigating Officer to prove respondent's intent. Evidence of an unauthorized touching is sufficient to prove the third specification since an intent to injure is not an element of assault or of battery. Appeal Decision 2452 (MORGANDE) and Appeal Decision 2273 (SILVERMAN). Moreover, it is well-established that specific intent is not a prerequisite element for proof of misconduct or violation of law in suspension and revocation proceedings which are by nature remedial. Appeal Decision 2496 (McGRATH); Appeal Decision 2286 (SPRAGUE); Appeal Decision 1999 (ALT & JOSSY) and Appeal Decision 922 (WILSON). Thus, the third specification was sufficient to allow Appellant a fair opportunity to defend himself pursuant to 46 C.F.R. ÷5.25.

III

Appellant claims the Administrative Law Judge failed to make specific findings of fact as to the third specification. First, Appellant argues the Administrative Law Judge made no finding as to who, between the Second Mate and Appellant, was the assailant. Appellant is incorrect; the Administrative Law Judge explicitly found that "the Second Mate put his hand on Respondent's right side and immediately was struck by the Respondent on the left side of his face." [Decision and Order p. 5]. The Administrative Law Judge made this finding from the conflicting testimonies of the only two witnesses to the assault, Mr. Viso and Appellant. Findings based on conflicting testimony are credibility determinations which are peculiarly within the discretion of the trier of fact. These findings will not be disturbed on appeal unless inherently incredible. Appeal Decision 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986); Appeal Decision 2356 (FOSTER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2340 (JAFFE); Appeal Decision 2333 (AYALA) and Appeal Decision 2302 (FRAPPIER). The Administrative Law Judge's finding that the Appellant was the assailant is not inherently incredible.

Appellant asserts that the Administrative Law Judge did not make specific findings of fact as to whether Mr. Olivo, if he was intoxicated, could have had the requisite intent to commit assault. As stated above, specific intent is not an essential element to be proved in suspension and revocation proceedings. Appeal Decision 2496 (McGRATH), see infra p. 9. Nevertheless, voluntary intoxication is not a defense for acts of misconduct since the inability to act properly arose from one's own prior misconduct.

Appeal Decision 979 (HENDRICKS). See also, Appeal Decision 1908 (NEILSON), aff'd Commandant v. Nielson, NTSB Order No. EM-35; Appeal Decision 1550 (REHM); Appeal Decision 1511 (MOYLES) and Appeal Decision 776 (MESSICK).

Appellant asserts that if he struck the Second Mate, his response was in self-defense. Since Appellant does not concede that he struck Mr. Viso, I assume that when he argues self-defense, he is conceding hypothetically that he did strike the Second Mate in the sequence of events found by the Administrative Law Judge. Appellant's assertion of self-defense is not supported by the facts. It is clear that self-defense is only that amount of force sufficient to cause the assailant to desist. Appeal Decision 2391 (STUMES); Appeal Decision 2163 (WITTICH) and Appeal Decision 1803 (PABON). Appellant's response to Mr. Viso's placing his hand upon Appellant's shoulder was not proportionate and therefore not in self-defense. Moreover, the Second Mate's touching of Appellant did not warrant such a battery since the only provocation which justifies the use of force is an actual attack such that force is the only means of defense. Appeal Decision 2290 (DUGGINS) and Appeal Decision 2193 (WATSON). Therefore, Appellant's assault of the Second Mate was not justified by any prior act of the Second Mate towards him.

Conversely, Appellant argues that, even had he assaulted the Second Mate in the manner found by the Administrative Law Judge, the Second Mate's response was excessive and constituted an assault. Appellant asserts that his physical condition following the altercation was evidence that the Second Mate was the assailant. While the degree of injury inflicted may be probative as to whether the Second Mate's response was lawful self-defense, the fact that Appellant may have been assaulted subsequent to the acts in question is irrelevant to the disposition of the charge and specification in this proceeding.

IV

Appellant claims the Administrative Law Judge did not make specific findings as to the credibility of the Appellant and the Second Mate as witnesses. Appellant is incorrect; the Administrative Law Judge made specific findings regarding the credibility of the Appellant, noting his intoxicated condition at the time in question, inconsistencies in his testimony and the weight of the testimony in contradiction to that of Appellant. Decision and Order pp. 8-9. Based on these considerations, the Administrative Law Judge found Appellant's testimony not credible to the extent it conflicted with other credible testimony including that of the Second Mate. Furthermore, since the reviewing body does not have the ability to ascertain the demeanor of the witnesses as does the fact-finder, precedent has long cautioned against making credibility determinations on appeal. Reagan v. United States, 157 U.S. 301 (1895); Martin v. American Petrofina Inc., 779 F.2d 250 (5th Cir. 1975); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), cert. denied 475 U.S. 1010 (1986), and Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909 (1975). See also, Appeal Decision 2474 (CARMIENKE). Since I do not find it inherently incredible, the Administrative Law Judge's resolution of the conflicting testimony will not be disturbed. Appeal Decision 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB order No. EM-130 (1986), see infra p. 9. See also, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951); City of New Orleans v. American Commercial Lines, 662 F.2d 1121, 1982 A.M.C. 1296 (5th Cir. 1981); and N.L.R.B. v Materials Trans. Co., 412 F.2d 1074, 1080 (5th Cir. 1969).

V

Appellant alleges that there was selective prosecution since, under the circumstances, the Investigating Officer did not also charge the Second Mate with assault. Appellant's claim is without merit.

The decision to charge is within the discretion of the Investigating Officer under 46 C.F.R. ÷5.105(a). The Investigating Officer's decision to prefer charges as between parties to the investigation does not give rise to any inference of prejudice. Appeal Decision 2052 (NELSON), appeal dismissed by Order EM-54, 2 NTSB 2810, recon. denied, NTSB Order EM-60. Furthermore, while the Investigating Officer's judgment is subject to review by his superiors, it is not a matter for review in suspension and revocation proceedings. Appeal Decision 2309 (CONEN).

VI

Appellant claims the order is in excess of regulatory proscriptions, and, in denying him a substantial portion of his annual income, it is a cruel and unusual civil penalty contrary to the Eighth Amendment of the United States Constitution. Appellant's claim is misplaced. Appellant mistakenly cites to the maximum civil penalty amount contained in 33 C.F.R. ÷95.055 as the standard for an appropriate sanction in these proceedings for being intoxicated aboard the vessel. However, Appellant was charged with misconduct for his violation of 33 C.F.R. ÷95.045. Applicable standards for assessing the severity of a particular order are found in 46 C.F.R. ÷5.569. Pursuant to 46 C.F.R. ÷5.569(d), the suggested range of an appropriate order for "violent acts against other persons (without injury)" is two to six months. There is no suggested range for being intoxicated aboard a vessel. For the charge of assault alone, however, the six month suspension is not excessive under these guidelines.

The order in a particular case is peculiarly within the discretion of the Administrative Law Judge and, absent some special circumstances, will not be disturbed on appeal. Appeal Decision 2468 (LEWIN); Appeal Decision 2379 (DRUM); Appeal Decision 2366 (MONAGHAN); Appeal Decision 2352 (IAUKEA); Appeal Decision 2344 (KOHAJDA); and Appeal Decision 1751 (CASTRONUOVO). The circumstances which Appellant referred to in mitigation of the order are not compelling since hardship, in and of itself, is not proper grounds to modify suspension orders. Appeal Decision 2323 (PHILPOTT) and Appeal Decision 1666 (WARD).

Additionally, Appellant's Eighth Amendment claim is inappropriate. Despite Appellant's assertion that the order was clearly a civil penalty, suspension and revocation proceedings, being remedial in nature, fix neither criminal nor civil liability. Suspension and revocation proceedings are administrative actions against licenses, certificates and documents and are intended to help maintain standards of competence and conduct essential to the promotion of safety at sea. 46 C.F.R. ÷5.5. See also, Appeal Decision 2474 (CARMIENKE) and Appeal Decision 2316 (McNAUGHTON).

VII

The disposition of the preceding issues negates any need to discuss Appellant's claim for damages and attorney fees against the Coast Guard.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 21 April 1989 at Long Beach, California is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 5th day of October 1990.

S/R OLIVO

6 MISCONDUCT

6.12 Assault

-intent, lack of

6.13 Assault and Battery

-intent to injure is not an element

-self-defense is only that amount of force sufficient to cause the assailant to desist

-self-defense force not justified in the absence of an actual attack

6.176 Intoxication

-to come aboard while intoxicated is misconduct

-proof of

-voluntary intoxication is not a defense to a charge of misconduct

6.360 Violation of rule/ regulation

-as misconduct

13 APPEAL AND REVIEW

13.10 Appeals

-issue may not be raised for first time on appeal

-can not challenge the adequacy of the specifications for the first time on appeal when Appellant understood the issues and had a full opportunity to litigate them on appeal

PLEADINGS

2.90 Specification

-sufficiency of

12 ADMINISTRATIVE LAW JUDGE

12.01 Administrative Law Judge

-order exclusively within discretion

12.29 Credibility

-ALJ determination upheld, unless inherently incredible

12.80 Modification of Order

-economic hardship of suspension/ revocation not grounds for

3 HEARING PROCEDURE

3.59 Investigating Officer

-discretion of, whether to bring charges

-discretion of, not a matter for review

CITATIONS

Appeal Decisions Cited: 2395 (LAMBERT); 2333 (AYALA); 2302 (FRAPPIER); 2198 (HOWELL); 1700 (McGRAW); 1461 (HALVORSEN); 2341 (SCHUILING); 2445 (MATHIASON); 2248 (FREEMAN); 2450 (FREDERICKS); 2400 (WIDMAN); 2386 (LOUVIERE); 2422 (GIBBONS); 2166 (REGISTER); 2452 (MORGANDE); 2273 (SILVERMAN); 2496 (McGRATH); 2286 (SPRAGUE); 1999 (ALT & JOSSY); 922 (WILSON); 2390 (PURSER); 2356 (FOSTER); 2344 (KOHAJDA); 2340 (JAFFE); 979 (HENDRICKS); 1908 (NIELSON); 1550 (REHM); 1511 (MOYLES); 776 (MESSICK); 2391 (STUMES); 2163 (WITTICH); 1803 (PABON); 2290 (DUGGINS); 2193 (WATSON); 2474 (CARMIENKE); 2052 (NELSON); 2309 (CONEN); 2468 (LEWIN); 2379 (DRUM); 2366 (MONAGHAN); 2352 (IAUKEA); 1751 (CASTRONUOVO); 2323 (PHILPOTT); 1666 (WARD); 2316 (McNAUGHTON)

NTSB Cases Cited: Commandant v. Mathiason, NTSB Order No. EM-146; Commandant v. Fredericks, NTSB Order No. EM-146; Commandant v. Nielson, NTSB Order No. EM-35; Commandant v. Purser, NTSB Order No. EM-130; Commandant v. Nelson, NTSB Order No. EM-54, recon. denied NTSB Order No. EM-60

Federal Cases Cited: Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950); NLRB v. McKay Radio & Telegraph Co., 304 U.S. 333 (1938); Citizens State Bank of Marshfield, Mo v. FDIC, 752 F.2d 209 (8th Cir. 1984); Parker v. United States, 359 F.2d 1009 (D.C. Cir. 1966); Reagan v. United States, 157 U.S. 301 (1895); Martin v. American Petrofina, Inc., 779 F.2d 250 (5th Cir. 1975); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985); Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951); City of New Orleans v. American Commercial Lines, 662 F.2d 1121 (5th Cir. 1981); N.L.R.B. v. Materials Trans. Co., 412 F.2d 1074 (5th Cir. 1969)

Statutes and Regulations Cited: 33 C.F.R. ÷95.045, ÷95.020, ÷95.030, ÷5.055; 46 C.F.R. ÷5.25, ÷5.105(a), ÷5.569(d), ÷5.5; 46 U.S.C. ÷7703(2)

***** END OF DECISION NO. 2512 *****